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Bulk Transfers under the Uniform Commercial Code

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further provides that any provision between the parties contrary to the intent of the section shall be ineffective. North Dakota is said to be the only state which has so expressly limited the waiver of any of the implied warranties provided for in the Uniform Sales Act.⁴⁴

The Uniform Commercial Code, in dealing with the cumulation and conflict of warranties, provides that they shall be construed to be consistent with each other and as cumulative.⁴⁵ In case of conflict the intent of the parties is dominant. The general rule at present is that both express and implied warranties can exist side by side if they are not inconsistent,⁴⁶ but if they are found to be inconsistent the express warranty will prevail.⁴⁷ This result is based on the premise that the expressed intent of the parties should prevail over a warranty which is created by operation of law.

This section of the UCC is essentially the same as the present provisions regarding conflict of warranties found in the Uniform Sales Act,⁴⁸ with the exception that the proposed provision would hold an implied warranty of fitness for a particular purpose to supreme in the event of an inconsistency with an express warranty.

HARRY PIPPIN

GEORGE DYNES.

BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE. — Though statutes regulating the sale of goods in bulk are relatively new to the law, they have spread rapidly, with the result that some confusion has been occasioned through their rather disorganized incorporation into the statute books of the various jurisdictions. The purpose of such statutes is concisely summed up in the introduction to the Bulk Transfers Article in the UCC. They are intended to deal with two common forms of commercial fraud: (1) "The merchant, owing debts, who sells out his stock in trade to a friend for less than it is worth, pays his creditors less than he owes them, and hopes to come back into the business through the back door some time in the future," and (2) "the merchant, owing debts, who sells

44. See Note, 57 Yale L. J. 1389, 1401, n. 70 (1953).

45. U.C.C. § 2-317.

46. *Rowe Manufacturing Co. v. Curtis-Straub Co.*, 223 Iowa 858, 273 N.W. 895 (1937); *Peterson v. Dreher*, 196 Iowa 178, 194 N.W. 53 (1923); *Northwest Engineering Co. v. Gjellefeld-Chapman Construction Co.*, 57 N.D. 500, 222 N.W. 621 (1928).

47. N.D. Rev. Code § 51-0116 (6) (1943) provides: "An express warranty or condition does not negative a warranty or condition implied under this chapter unless inconsistent therewith."

48. See note 47, *supra*.

out his stock in trade to anyone for any price, pockets the proceeds and disappears leaving his creditors unpaid."¹

The UCC attempts to eliminate some of the niceties and subtle distinctions which have cropped up in the application of the various bulk sales statutes, and thus to resolve some of the confusion which may result from the so-called bulk sale transaction. Briefly, a bulk sale may be defined as a transfer in whole or major part of the seller's stock in trade, including inventory and in some jurisdictions fixtures.² The various jurisdictions are uniform in providing that the transfer must be made out of the ordinary course of trade.³ No change will be made by the Bulk Transfers Article of the Code in this respect.⁴

A bulk sale *per se* is not necessarily tortious. However, when the seller's motive in disposing of his property is to place it beyond the reach of his creditors, then the sale becomes a form of fraudulent conveyance.⁵ One purpose of bulk sales legislation is to regulate such transfers for the protection of creditors and to set down certain basic rules by which the purchaser for value may protect himself.⁶

I. *Present State of the Law*

There are two basic forms of bulk sales legislation. These are the so-called New York form and the Pennsylvania form.⁸ The former is the more widely adopted while the latter, for reasons which will become obvious, is most favored by agencies which extend credit. The New York form has been adopted in North Dakota.⁹ It provides that a seller must furnish to his creditors a detailed inventory of the goods to be sold and that the buyer must demand and get from the seller a list of the latter's creditors and inquire of each of them as to whether he has received due notice of the transaction from the seller.¹⁰ Failure to do this will make the buyer a receiver for the benefit of the seller's creditors.¹¹

The Pennsylvania form, however, places a somewhat harsher

1. U.C.C. § 6-101, Comment (1952).

2. *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436 (1907); *Calvert Building & Construction Co. v. Winakur*, 154 Md. 519, 141 Atl. 355 (1928); *Marlow v. Ringer*, 79 Va. 568, 91 S.E. 386 (1917).

3. *Gallus v. Elmer*, 193 Mass. 106, 78 N.E. 772 (1906); *Marlow v. Ringer*, *supra* note 2.

U.C.C. § 6-102 (1).

5. *Hronik v. Warty*, 205 Iowa 1111, 217 N.W. 449 (1928).

6. UCC § 6-104.

7. N.Y. Pers. Prop. Law § 44; UCC § 6-101, Comment.

8. Penn. Stat. Ann., Title 69, § § 521-529; U.C.C. § 6-101, Comment.

9. N.D. Rev. Code § § 51-0201, 51-0204 (1943).

10. See Note 7, *supra*.

11. *Ibid.*

burden on the purchaser. He must not only comply with the duties of notice set out above but in addition must take measures to see that the consideration he transfers to the seller for the goods is applied to the seller's debts.¹² Both the New York and Pennsylvania statutes have exercised a considerable influence on the drafting of the Bulk Sales Article of the UCC. Thus, the Pennsylvania provision has found its way into the Code,¹³ but in view of the fact that there exists room for serious divergence of opinion with respect to its underlying policy it has been bracketed in the text of the Code to indicate that its adoption is optional.¹⁴ In short, the Uniform Code permits each state to make its own decision on the point.

Some change will be wrought in the law regarding sales of fixtures. The weight of authority does not treat sales of fixtures as sales in bulk¹⁵ though there is a trend in the cases and legislation toward including them in the bulk sales category.¹⁶ The UCC provides that "sales of equipment" will not be considered bulk sales unless in conjunction with a sale of inventory.¹⁷ Thus it would seem that the adoption of the UCC would reverse a present statutory trend.¹⁸

The scope of modern bulk sales legislation is surprisingly inclusive and the decisions indicate that one cannot be hampered by literal-mindedness in interpreting the law. An analytical definition of what constitutes a bulk sale leads to some rather interesting observations. Thus, if a debtor takes out a chattel mortgage on goods falling within the bulk sales law of his particular jurisdiction, he will be considered to have acted in fraud of creditors as defined by the bulk sales law if he does not comply with the law. As mortgagor he is considered to occupy the position of a seller and the mortgagee is felt to be in the position of a buyer.¹⁹ However, it should be noted that this applies only to chattel mortgages. Sales of real property, and in most cases buildings located thereon, are not considered bulk sales within the meaning of the bulk sales

12. See note 8, *supra*.

13. U.C.C. § 6-106.

14. See Note appended to U.C.C. § 6-106.

15. *Gallus v. Elmer*, 193 Mass. 106, 78 N.E. 772 (1906); *McPartin v. Clarkson*, 240 Mich. 390, 215 N.W. 338 (1907); *Swift v. Tempelos*, 178 N.C. 487, 101 S.E. 8 (1919) (trade fixtures acquired for the purpose of conducting a business are not within the meaning of a law regulating transfers of merchandise in bulk).

16. *McPartin v. Clarkson*, *supra* note 15.

17. U.C.C. § 6-102 (3).

18. U.C.C. § 6-102, Comment.

19. *Michigan Packing Co. v. Messaris*, 257 Mich. 422, 241 N.W. 236 (1932) (Statute declaring chattel mortgage covering merchandise and fixtures void unless creditors are notified; held, applicable to restaurant business, hence mortgage covering restaurant equipment was void as against creditors without notice).

acts.²⁰ It may also be noted that the term "creditors" when applied to bulk sales situations includes all creditors of the seller.²¹ There is no restriction to merchandise creditors alone.²²

As indicated in the chattel mortgage situation, the courts are quite ready to go behind the form of the transaction to look at its practical effect. For example, a sale of a major part of the stock in trade or inventory of a business to another with the understanding that the vendee will be admitted as a partner in the business is considered a bulk sale within the statute.²³ This is true despite the fact the goods in question will remain in the same location and and may be considered assets of the partnership. The passage of title is apparently sufficient.

Also noteworthy is the fact that where the transferor executes a sale of merchandise to one of his creditors in full or partial satisfaction of a debt, unless the provisions of the bulk sales law are complied with the sale will be voidable as to the other creditors of the common debtor.²⁴

Bulk sales are also divisible. In one case it was held that where the transferor operated a drug store separate and independent from his general store, the sale of a major part of the merchandise of the drug store would be considered a sale in bulk within the meaning of the statute.²⁵ However, where two businesses are carried on in the same location and one is operated in conjunction with the other, as where a candy counter is operated in a pool room, the fixtures of one will not be considered to be assets of the other since the businesses are obviously of a separate nature.²⁶ Where only part of the goods sold come within the purview of the bulk sales law, the transaction will be considered void or voidable as to that part only.²⁷

Bulk sales legislation is generally considered applicable to wholesale as well as retail merchants²⁸ and there seems to be a

20. *Congress Candy Co. v. Farmer*, 73 N.D. 174 12 N.W.2d 796 (1944).

21. *Burnett v. Trimmell*, 102 Kan. 130, 173 Pac. 6 (1918) (The term creditor not confined to those who have sold merchandise to the vendor but covers creditors generally); *Brinson v. Monroe Auto Supp. Co.*, 180 La. 1064, 158 So. 558 (1935).

22. *McKinster v. Sager*, 163 Ind. 671, 72 N.E. 854 (1904); *Burnett v. Trimmell*, *supra* note 21; *Brinson v. Monroe Auto. Supp. Co.*, *supra*, note 21.

23. *Marlow v. Ringer* 79 Va. 568, 91 S.E. 386 (1917); *Daly v. Sumpter Drug Co.*, 127 Tenn. 412, 155 S.W. 166 (1913).

24. *Thorpe v. Pennock Merc. Co.*, 99 Minn. 22, 108 N.W. 940 (1906); *Escale v. Mark*, 43 Nev. 172, 183 Pac. 387 (1919).

25. *Young v. Lemieux*, 79 Conn., 434, 65 Atl. 436 (1907).

26. *McPartin v. Clarkson*, 240 Mich. 390, 215 N.W. 338 (1907).

27. *In Re Elliott*, 48 F. Supp. 146 (1942); *McMillen v. Nelson*, 47 N.D. 284, 181 N.W. 618 (1921).

28. *Root Refineries v. Gay Oil Co.*, 171 Ark. 129 (1926); *North American Provision Co. v. Fischer Lime & Cement Co.*, 168 Ark. 106, 269 S.W. 993 (1925).

tendency to stretch its scope beyond the purely mercantile transaction and to include sales of farm equipment and the like.²⁹ However there is some division of authority on this point and the UCC does not include farming within the coverage of the Bulk Transfers Article.³⁰

The Code expressly enumerates sales which shall be considered exempt from the Bulk Transfers Article. These are:

- (1) Those made for the sole purpose of giving security for the repayment of new value extended to the transferor. But if a bulk transfer also secures existing debts it is subject to this Article as to them;
- (2) General assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;
- (3) Sales in foreclosure of a lien or other security interest;
- (4) Sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process;
- (5) Sales made in the course of proceedings for the dissolution of a corporation and of which the creditors of the corporation receive advance notice substantially equivalent to that provided in this Article;
- (6) Transfers to a person maintaining a known place of business in this state who becomes bound to pay the debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound;
- (7) A transfer to a new business enterprise organized to take over and continue its business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors;
- (8) Transfers of property which is exempt from execution.³¹

Subsection (4), above, is the only one included in the North Dakota Code, so the adoption of the UCC in this State would lead to considerable expansion on this point.³²

Some question has been raised concerning the constitutionality of bulk sales laws on the ground that they constitute class legislation.³³ However, with the exception of a small minority,³⁴ such acts have almost universally been interpreted as constitutional, both on

29. *Coon v. Doss*, 361 Ill. 515, 198 N.E. 341 (1935); *Weskainies v. Hesterman*, 288 Ill. 199, 4 A.L.R. 128 (1919).

30. Annotation: 4 A.L.R. 132 et seq.; 25 A.L.R. (N.S.) 759.

31. UCC § 6-103.

32. N.D. Rev. Code § 51-0201 (4) (1943).

33. *Spurr v. Travis*, 145 Mich. 721, 108 N.W. 1090 (1906); *Noble v. Ft. Smith Wholesale Grocery Co.*, 34 Okla. 662, 127 Pac. 14 (1911).

34. *Block v. Schwartz*, 27 Utah 387, 76 Pac. 22 (1904).

the state and national level, as falling within the police power.³⁵ It seems doubtful that the adoption of the UCC will work any major changes in the interpretations of the bulk sales acts discussed above, since the state courts will probably continue to make their own interpretations of the law whether or not it assumes the cloak of uniformity, except, of course, where the terms of the Code are so express that latitude in interpretation is made virtually impossible.

It should be noted that as a general rule, transfers by a manufacturer are not within the Bulk Sales Acts.³⁶ This rule has been construed to mean that anything used by a manufacturer to make his product, though not actually made by him, will be considered outside of the local statutes.³⁷ For example, if an aircraft company sold a major part of the stock of engines which it had in inventory, this would probably not be considered a bulk sale, even though the engines themselves were not manufactured by the company, but were ordered from outside. The reason is that the company makes use of them as essential parts of its product. The Uniform Commercial Code tightens this view somewhat. It provides that sales by one who manufactures what he sells will be considered to come within the Bulk Transfers Article.³⁸ This is, of course, to be distinguished from the situation where a wholesaler or retailer buys from a manufacturer. In such cases, the manufacturer would not be within the purview of the Article.³⁹

II. *The Law in North Dakota*

Disregarding the UCC for the moment, the North Dakota law is generally in conformity with the majority of the other states, since it has the New York form of bulk sales legislation discussed previously.⁴⁰ The bulk sales law in this jurisdiction is quite brief, consisting of four sections in the Revised Code.⁴¹ The first section

35. *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio 115, 110 N.E. 648 (1915) (Section 2 of the Ohio Constitution, as amended, contains a specific grant to the legislature to provide by law for the regulation of the sale and conveyance of personal property and is a qualification to that extent of the guaranties contained in the Bill of Rights); *William Tackaberry Co. v. German State Bank*, 39 S.D. 185, 163 N.W. 709 (1917); *Cantrell v. Ring*, 125 Tenn. 472, 145 S.W. 166 (1912).

36. *Cooney v. Sweat*, 133 Ga. 511, 66 S.E. 257 (1909); *Charles J. Off & Co. v. Morehead*, 235 Ill. 40, 85 N.E. 264 (1908).

37. *Connecticut Steam Brown Stone Co. v. Lewis*, 86 Conn. 386, 85 Atl. 534 (1912); *Cooney v. Sweat*, *supra* note 36.

38. U.C.C. § 6-102 (4) (1952).

39. *Spurr v. Travis*, 145 Mich. 721, 108 N.W. 1090 (1906).

40. See notes 7, 9, 10 & 11 *supra*.

41. N.D. Rev. Code § § 51-0201, 51-0204 (1943).

defines and limits the essential parties and terms in the transaction.⁴² The seller is defined as any person selling, transferring, or assigning property.⁴³ The purchaser is one who acquires property by sale, transfer or assignment.⁴⁴ It is also indicated that the terms "seller" and "purchaser" include corporations, copartnerships, associations and individuals.⁴⁵ The term "seller" does not include executors, administrators, receivers, or public officers.⁴⁶ With the exception of the last-mentioned exemption, with which it agrees, the UCC does not expressly define the parties to the sale.⁴⁷

The next section of the North Dakota Code⁴⁸ describes the procedure to which the parties must conform before they can make a valid bulk sale. First, it is provided that the transferor must make a complete inventory with the aid of the transferee at least five days before the transfer. This inventory must include the goods to be transferred, their cost, as nearly as it can be determined, to the transferor, and the quality of the goods.⁴⁹ Next, the purchaser must obtain a complete list of the seller's creditors. This is to be furnished by the seller and it must include the amount owed to each. The list is to be certified under oath by the seller.⁵⁰

Finally, it is provided that the purchaser at least five days before taking possession of the goods shall notify by registered mail, or in person, every creditor of the seller shown on the list, and the notice shall contain information as to the price, terms and conditions of the proposed sale.⁵¹ This section also defines a bulk sale as "the sale, transfer, or assignment, in bulk, or any part of the whole of a stock of merchandise or merchandise and fixtures pertaining to the conduct of a business, otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller, transferor or assignor . . ."⁵² It will be noted that a sale of "merchandise and fixtures" will be considered void under the statute unless the procedural provisions outlined above are complied with. No mention is made of sales of fixtures alone being invalid, however. It is thus possible to reason that North Dakota is already in accord with the UCC provision that "sales of equipment"

42. *Ibid.* § 51-0201.

43. *Id.* § 51-0201 (1).

44. *Id.* § 51-0201 (2).

45. *Id.* § 51-0201 (3).

46. *Id.* § 51-0201 (4).

47. U.C.C. § 6-103 (4).

48. N.D. Rev. Code § 51-0202 (1943).

49. *Ibid.* § 51-0202 (1).

50. *Id.* § 51-0202 (1).

51. *Id.* § 51-0202 (3).

52. *Id.* § 51-0202.

will not be considered void unless coupled with a sale of inventory.⁵³

Further comparing the law, it may be pointed out that the UCC requires only that a list of the property sufficient to identify it be furnished to the creditors of the seller.⁵⁴ Nothing is said concerning cost to the seller or quality. The provisions as to the content of the notice are more stringent in the UCC, however. Not only must the requirements of the present statute be substantially met but the transferee must include notice of how the debts of the transferor are to be paid.⁵⁵ He must also preserve the list and schedule for six months following the sale.⁵⁶ However, there is accord on the point that the transferee will not be liable for errors in the list prepared by the transferor unless he has notice of them.⁵⁷

In contrast to North Dakota's present law, the UCC requires ten days' notice to creditors instead of the five presently needed.⁵⁸ As already pointed out, the UCC gives adopting states an option to require the purchaser to account to the creditors for the application of the proceeds of the sale.⁵⁹ This provision is not found in North Dakota, which merely makes one who does not conform to the statute a receiver for the benefit of creditors.⁶⁰ As mentioned before, this provision has been the subject of a division of opinion and it is quite possible that North Dakota, even if it does adopt the Uniform Code, will not adopt the section requiring the purchaser to oversee the application of the purchase money, due to the hardship it places on the purchaser. Though this form of legislation has its adherents among credit agencies, the majority of jurisdictions have refused to enact it.⁶¹ The last section of the North Dakota statutes on the subject merely provides that one who conforms with the provisions of the chapter shall be protected against the claims of his transferor's creditors, certainly a *sine qua non*.⁶²

Some modification in the law of North Dakota will be worked in the matter of sales at auction. These are included in the UCC under the heading of Bulk Transfers,⁶³ but are listed in a separate

53. U.C.C. § 6-102 (3); N.D. Rev. Code § 51-0202 (1943).

54. U.C.C. § 6-104 (1b).

55. U.C.C. § 6-106.

56. U.C.C. § 6-104 (1c).

57. U.C.C. § 6-104 (3).

58. U.C.C. § 6-105 (2); N.D. Rev. Code § 51-0202 (3) (1943).

59. U.C.C. § 6-106 (1).

60. N.D. Rev. Code § 51-0203 (1943).

61. U.C.C. § 6-101 Comment (4) (1952).

62. N.D. Rev. Code § 51-0204 (1943).

63. U.C.C. § 6-108.

chapter in the North Dakota Code.⁶⁴ The North Dakota law regarding auctions at present provides virtually no protection for creditors, but merely stipulates that the clerk of the auction shall retain the proceeds of the sale to satisfy any outstanding taxes if notified of their existence by the county treasurer.⁶⁵ The UCC, however, makes the Bulk Transfers Article fully applicable to auction sales and requires the auctioneer to deliver the required notice to the seller's creditors after having ascertained their identity.⁶⁶ In addition to this, he must see that the proceeds are applied to the seller's debts.⁶⁷ However, if the controversial §6-106 of the UCC is not adopted this latter provision will be inapplicable and the auctioneer will probably stand in the shoes of the buyer and be a receiver for the benefit of the seller's creditors if he fails to comply with the terms of the Act. Also noteworthy is the fact that in case of non-compliance by the auctioneer, he, and not the purchaser, is personally liable to the creditors.⁶⁸

As to subsequent transfers, the UCC provides that the subsequent transferee taking with knowledge of his transferor's defect will take subject to it, whereas the transferee taking without knowledge takes free and clear of such defect.⁶⁹ This seems to be simply good, sound elementary personal property law. Finally, a six months statute of limitations is imposed on actions to be brought under the Article.⁷⁰

III. Conclusion

Although there are parts of the UCC which have evoked criticism, the Bulk Transfers Article is far more adequate and leaves far less to judicial conjecture than does most bulk sales legislation. Certainly it is far more complete than the North Dakota law, and since the bulk transfer is not limited to any one ecological area, but may be found wherever business flourishes on whatever scale, this State might do very well to examine it closely as a definitive and precise compilation of statutes on the law of bulk sales.

There is, of course, a conflict of interest going hand in hand with any legislation, but the Bulk Transfers Article, as it stands,

64. N.D. Rev. Code C. 51-05 (1943).

65. *Ibid.* § 51-0503.

66. U.C.C. § 6-108 (3b).

67. U.C.C. § 6-108 (3c).

68. U.C.C. § 6-108 (4).

69. U.C.C. § 6-110.

70. U.C.C. § 6-111.

seems to do a very workable job of compromise. Both seller and purchaser have their rights well defined, and such concepts as the inclusion of the auction sale in the field of bulk sales are clearly well conceived.⁷¹ Certainly the former laxity on this point alone provided an excellent potential means for an unscrupulous creditor to escape his obligations. In summation it might be said that though ideally North Dakota might do better, it could also do a great deal worse as far as the adoption of this particular section of the UCC is concerned.

DOUGLAS BIRDZELL
JAMES O'KEEFE
THALES SECREST.

NEGOTIABLE INSTRUMENTS — FICTITIOUS PAYEES — CHANGES EFFECTED BY THE UNIFORM COMMERCIAL CODE. — The common law as developed in England¹ and subsequently restated in early American cases,² declared that an instrument which was payable to the order of a designated payee should be given the effect of an instrument payable to bearer, if the instrument had been made payable to the order of a fictitious payee and such fact was known to the party sought to be charged thereon.³ This was later revised by the British Bills of Exchange Act,⁴ and the rule has subsequently evolved to its present form in the Uniform Negotiable Instruments Law,⁵ which states: "The instrument is payable to bearer when it is payable to the order of a fictitious or nonexistent person and such fact was known to the person making it so payable."

A very anomalous situation occurs when courts are called upon to treat an instrument payable to the order of a designated person as if it were expressly payable to bearer. This is the fact however when fictitious payees are considered. Although this situation has not been adjudicated in North Dakota, it is by no means uncommon in other jurisdictions and has been decided in both South Dakota⁶ and Minnesota⁷ both of which have laws similar to our own.⁸

71. U.C.C. § 6-108 and Comment.

1. *Minet v. Gibson*, 1 H.Bl. 569, 100 Eng. Rep. 689 (1791).

2. See *Shipman v. Bank of State of New York*, 126 N.Y. 318, 27 N.E. 371 (1891).

3. *Britton, Bills and Notes* 691 (1943).

4. See *Vagliano v. Bank of England*, 22 Q.B. 103 (1888), *aff'd*, 23 Q.B. 243 (1889).

5. *Negotiable Instruments Law* § 9 (3); N.D. Rev. Code § 41-0209 (3) (1943).

6. See *Janssen v. Tusha*, 66 S.D. 604, 287 N.W. 501 (1939).

7. See *Jorgensen Chevrolet Co. v. First Nat. Bank of Red Wing*, 217 Minn. 413, 14 N.W.2d 618 (1944).

8. S.D. Code § 46.0114 (3) (1939); Minn. Stat. § 335.052 (3) (1945).